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No. 06-274

IN THE
Supreme Court of the United States

SOUTH CAROLINA STATE BOARD OF DENTISTRY,
Petitioner,

v.

FEDERAL TRADE COMMISSION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR PETITIONER

LYNNE W. ROGERS
General Counsel,
South Carolina
Department of
Labor, Licensing
& Regulation
Columbia, South Carolina

WILLIAM H. DAVIDSON, II
ANDREW F. LINDEMANN
*KENNETH P. WOODINGTON
**Counsel of Record*
DAVIDSON, MORRISON
& LINDEMANN, P.A.
Post Office Box 8568
Columbia, South Carolina 29204
(803) 806-8222
Counsel for Petitioner

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REPLY BRIEF FOR PETITIONER

In its opposition brief, the FTC essentially and without foundation denies that this case revives a circuit conflict. The Commission then engages in unfounded speculation that *Will v. Hallock*, ___ U.S. ___, 126 S.Ct. 952 (2006), might eventually cause the circuits that now permit immediate appeals of cases such as this to change their minds. The FTC also has confused the merits inquiry with the *Parker v. Brown* immunity inquiry, as did the Fourth Circuit in this case and as did the Sixth Circuit twenty years ago in *Huron Valley Hosp., Inc. v. City of Pontiac*, 792 F.2d 563 (6th Cir. 1986), the only other case reaching the same result as the Fourth Circuit. Finally, the Commission asks this Court to apply the appeal provision of the FTC statute, 15 U.S.C. § 45(c), with a literalness that has never been applied to civil appeals under 28 U.S.C. § 1291, and that would eliminate all collateral order review if so applied.

A. The Fourth Circuit's Decision Revives A Split In The Circuits.

As already argued in the Petition, the decision of the Court of Appeals revived a circuit split that might previously have been thought stale and nonexistent.[1] Pet. 6-9. The Commission's primary argument on the point appears to be that the decision last Term in *Will v. Hallock*, ___ U.S. ___, 126 S.Ct. 952 (2006), would have the effect of dictating a different rule in those circuits that have permitted immediate

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[1] The Commission inexplicably argues at one point that only one circuit permits immediate appeals of orders denying *Parker* immunity. Br. in Opp. 7. Later, however, the Commission appears to agree with the Petitioner that the rule in both the Fifth and the Eleventh Circuits is to permit immediate review. Br. in Opp. 16-17.

appeals of orders denying *Parker v. Brown* immunity. However, *Will* broke little or no new ground, and will not bear the weight the Commission seeks to place on it. *Will* was not a case in which either party sought certiorari to review the lower court's collateral order decision. Instead, the appealability issue was raised by this Court on its own motion as part of the grant of certiorari. 545 U.S. 1103 (2005). Having directed the parties to brief the question, this Court then directed the Second Circuit to dismiss the appeal for lack of jurisdiction. 126 S.Ct. at 961.

Will involved an attempt by customs agents to appeal, prior to trial, a denial of their claim that the judgment bar of the Federal Tort Claims Act, 28 U.S.C. § 2676, had claim-preclusive effect. This Court reversed the Second Circuit's decision to permit the appeal under the collateral order doctrine. However, this result in *Will* was foreshadowed by this Court's statement twelve years earlier in *Digital Equipment Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 873 (1994), that collateral order review would not apply to a claim that "an action is barred on claim preclusion principles."[2] While *Will* reiterated the "modest scope" of the collateral order doctrine, 126 S.Ct. at 958, it noted at the same time that previous cases such as *Digital Equipment* had held to the same effect. Thus, fairly read, *Will* is best viewed as involving no more than an application of existing principles, previously announced, to a case that came to the Court in almost accidental fashion. Or as this Court itself stated in *Will*, "we have meant what we have said. . . ." *Id.* Certainly *Will* had nothing at all to say about a claim under *Parker v. Brown*, except to the extent that *Will* reiterated already-familiar principles respecting collateral order review.

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[2] This statement in *Digital Equipment* was quoted in *Will*, 126 S.Ct. at 958.

The Commission argues that *Will* and *Digital Equipment* should provide the Fifth and Eleventh Circuits with "ample basis . . . to revisit [their] prior precedent. . . ." Br. in Opp. 15. However, neither circuit chose to do so in the years following the 1994 decision in *Digital Equipment*, as shown by the post-1994 cases cited in the footnote.[3] There is accordingly no reason to believe that *Will's* reiteration of the principles of *Digital Equipment* will provide either circuit with additional inducement to reach a different result in cases involving denial of *Parker v. Brown* immunity.

Instead of a circuit split that may be healing over, therefore, the existing split is one that is growing, aided substantially by the decision of the Court of Appeals in the present case. Two circuits, the Sixth and now the Fourth, have denied immediate appeals of denials of *Parker* immunity. Two others, the Fifth and the Eleventh, have permitted such appeals. Still another two circuits, while not having occasion to reach the issue, have at least noted without criticism the rationale for permitting such appeals. *We, Inc. v. City of Philadelphia*, 174 F.3d 322, 329 (3rd Cir. 1999); *Segni v. Commercial Office of Spain*, 816 F.2d 344, 346 (7th Cir.1987). The law on this point is therefore substantially inconsistent across the country, and in need of a definitive ruling by this Court.

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[3] Fifth Circuit: *Martin v. Memorial Hosp.*, 86 F.3d 1391 (5th Cir. 1996); *Earles v. State Bd. of Certified Public Accountants of Louisiana*, 139 F.3d 1033 (5th Cir.), cert. denied, 525 U.S. 982 (1998); *Acoustic Systems, Inc. v. Wenger Corp.*, 207 F.3d 287 (5th Cir. 2000). Eleventh Circuit: *TEC Cogeneration Inc. v. Florida Power & Light Co.*, 76 F.3d 1560 (11th Cir. 1996); *Praxair, Inc. v. Florida Power & Light Co.*, 64 F.3d 609 (11th Cir. 1995), cert. denied, 517 U.S. 1190 (1996)

B. Denying Immediate Appellate Review In Cases Such As This Impairs Substantial Public Interests.

The Board of Dentistry has already argued that *Parker*, a manifestation of federalism principles, is by its nature an important part of the state-federal relationship. Pet. 11-13. These federalism principles are the same kind of "high order" values that are protected by other doctrines for which appeals are permitted under the collateral order rule.[4] Indeed, it is likely that protecting an entire state agency against antitrust litigation from which it is exempted by Congress involves values of as high or higher an order as qualified immunity, which simply protects individual government officials from having to defend novel claims.

The Commission makes only one passing mention of the State's federalism interests. Br. in Opp. 11. The Commission's essential response to the question of whether the *Parker* defense represents a "high order" value is to sidestep it. The Commission implies that the defense cannot possess "high order" value because, the Commission claims, it is a substantive defense rather than an immunity, and secondly, because it can be used by entities other than states, including lower governmental units and even private individuals. Br. in Opp. 12-14.

Neither of these arguments logically refutes the idea that it is important from a federalism standpoint for a state agency not to be subjected to antitrust litigation. In fact, that interest is so important that the state should be permitted an

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[4] The term "some particular value of a high order" appears in *Will*, 126 S.Ct. at 959.

immediate appeal whenever its exemption from the antitrust laws has been denied by a trial tribunal. *See* Pet. 11-13.

The Commission's argument that *Parker* creates a substantive defense is not inherently or logically a ground for denying appealability in a case where the values protected by the collateral order doctrine are present. As the Board has already preliminarily argued, Pet. 9-10, *Parker* is most accurately regarded as creating an immunity, that is, an exemption from suit rather than merely a defense to the suit. If state law authorizes an action by a state agency, that action is exempt from antitrust liability no matter how much it might result in the restraint of trade and no matter how much damage it might cause to the complaining party.

The Commission also points out that this Court has held that "[i]n fashioning a rule of appealability under § 1291, however, we look to categories of cases, not to particular injustices." *Van Cauwenberghe v. Biard*, 486 U.S. 517, 529 (1988). However, the Commission offers no reason why antitrust suits against state agencies and actors (as opposed to private or municipal actors) cannot be regarded as a discrete category of cases for appealability purposes. Indeed, the Fifth Circuit has made just such a distinction between appeals by private defendants and by government defendants in the *Parker* context. *Acoustic Systems, Inc. v. Wenger Corp.*, 207 F.3d 287 (5th Cir. 2000)(private defendants could not immediately appeal the denial of *Parker* immunity, even in a circuit where such appeals were permitted for government officials).

C. The Application Of 15 U.S.C. § 45(c) Does Not Distinguish This Case From Those Involving 28 U.S.C. § 1291.

Finally, the Commission argues that this case is not immediately appealable because it does not involve a petition for review of a cease and desist order, the terms used in 15 U.S.C. § 45(c).[5] The short answer is that if such an argument, based on the literal language of the statute, were sufficient to defeat the collateral order rule, that rule would never have come into being, because 28 U.S.C. § 1291 contains language equally devoid of exceptions on its face. The latter section, of course, by its terms permits appeals only of "all final decisions of the district courts. . . ." However, as this Court noted in *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949), Section 1291 has long been given a "practical rather than a technical construction." The Commission in the present case does not suggest any reason why the same practical construction should not apply to Section 45(c). Instead, the Commission's primary argument is that Congress did not provide for any review of FTC actions other than review of cease and desist orders. The answer to this, as stated above, is that if the literal language of the statute were to control, there would be no collateral order doctrine under Section 1291, a statute whose language admits of no exception. If anything, Congress expressed *less* of an intent to require finality in FTC cases, because Section 45(c) simply provides for review

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[5] In the Court of Appeals, the Commission made almost no mention of this argument, referring to it only briefly in a footnote in the Jurisdictional Statement. Despite this apparent reluctance of the Commission to rely on this argument below, however, the Commission is probably correct in pointing out (Br. in Opp. 20 n.7) that it is a jurisdictional argument.

of "an order of the Commission to cease and desist" without reference to whether such order is final or not.

Contrary to the Commission's position, the same reasons exist for giving a practical construction to Section 45(c) as are present for Section 1291. In each instance, a rule requiring finality without such a practical construction would operate unfairly to deny immediate review to "that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen*, 337 U.S. at 546. Whether the present case is such a case is an issue that should be determined on the basis of the nature of the State's interests, discussed under other headings above, and not on the basis of the appeal having arisen under 15 U.S.C. § 45(c) rather than 28 U.S.C. § 1291.

CONCLUSION

For the reasons stated above and in the petition for writ of certiorari, the petition should be granted.

Respectfully submitted,

LYNNE W. ROGERS
General Counsel,
South Carolina
Department of
Labor, Licensing
& Regulation
Columbia, South Carolina

WILLIAM H. DAVIDSON, II
ANDREW F. LINDEMANN
*KENNETH P. WOODINGTON
**Counsel of Record*
DAVIDSON, MORRISON
& LINDEMANN, P.A.
Post Office Box 8568
Columbia, South Carolina 29204
(803) 806-8222
Counsel for Petitioner

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